United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7121

ORIGINAL

To be argued by
JOSEPH D. AHEARN

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
AUG 26 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

DORALEE ESTATES, INC.,

Plaintiff-Appellee,

—against—

CITIES SERVICE OIL COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

—against—

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendants-Appellees.

BRIEF OF THIRD-PARTY DEFENDANTS-APPELLEES

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FOR THE SECOND CIRCUIT

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MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendants-Appellees.

BRIEF OF THIRD-PARTY DEFENDANTS-APPELLEES

Introductory Statement

Defendant and third-party plaintiff Cities Service Oil Company ("Cities") appeals from the judgment of the United States District Court for the Southern District of New York filed on February 2, 1977. The case was tried before Judge Owen and a jury. At the close of the entire

case, Judge Owen dismissed Cities' third-party complaint against third-party defendants MGO Corp. and Monticello Gas and Oil Co., Inc. (hereinafter collectively referred to as "MGO") (1106-09).*

This action by plaintiff was commenced solely against defendant Cities. Jurisdiction is founded upon diversity of citizenship.

Plaintiff's complaint alleges that Cities owned real property on the westerly side of Cold Spring Road in the town of Thompson, Sullivan County, New York State, together with appurtenances and improvements, which real property was utilized and operated as an oil fuel storage depot with the consent, acquiescence, knowledge, participation and cooperation of defendant Cities (6-7). It is alleged in the complaint that plaintiff owned real property on the easterly side of Cold Spring Road which consisted of a bungalow colony (said bungalows being rented to the public for summer occupancy) together with the use of two lakes for fishing and boating (6). The complaint, served on or about February 28, 1973, alleged that Cities' real property, and the fixtures and personal property thereon, with the consent, acquiescence, knowledge, participation and cooperation of Cities, have been utilized from 1965 in such a manner so as to cause and permit fuel oil, wastes and other pollutants to be discharged from Cities' property onto and under Cold Spring Road and, further, to flow onto and into plaintiff's property (7). Plaintiff's complaint, *inter alia,* alleges causes of action in nuisance, in trespass and in negligence (7-8). The complaint seeks both consequential damages and punitive damages (9-10). The com-

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* Numerals in parentheses refer to pages in the appendix. Numerals in parentheses preceded by the letter "E" refer to pages in the exhibit volume.

plaint additionally alleges that defendant Cities had broken, repudiated and violated a stipulation of settlement entered into on April 25, 1972 in the Supreme Court of the State of New York, Sullivan County (11), which stipulation of settlement was annexed to the complaint as exhibit A (14-17).

Subsequently, defendant Cities served a third-party complaint upon MGO (18-22). Cities' third-party complaint was based solely upon an alleged indemnification agreement existing in a lease between Cities and MGO (the tenant) (18-22). Plaintiff's third-party complaint did not seek indemnification under any theory of common-law indemnification.

MGO is not directly concerned with the controversy existing between plaintiff and Cities *inter se*. Plaintiff chose not to commence action against MGO. The sole main controversy is between plaintiff and Cities. Such controversy affects MGO only insofar as that if recovery be sustained in favor of plaintiff against Cities, the nature of liability fastened upon Cities will prove that recovery will necessarily have been saddled upon Cities because of the intentional, deliberate, malicious and illegal acts of Cities itself. Liability upon Cities' part, if liability there be, is not of a vicarious nature. It does not arise through any act or omission upon MGO's part. As will be shown, if the judgment in favor of plaintiff against Cities be affirmed, then such affirmance conclusively establishes a holding that liability has been imposed upon Cities for its own intentional, deliberate, malicious and illegal acts. Such acts, as a matter of law, destroy any third-party complaint by Cities against MGO, no matter what theory of indemnification be urged by Cities.

Cities' third-party complaint is set forth at pp. 19-21. It purports to set forth solely a cause of action based

upon contractual indemnification. The portion of the lease agreement upon which Cities, the owner of the premises, relies for contractual indemnification against MGO, tenant of the premises, is ¶ 8 of the lease agreement executed between Cities and MGO on March 3, 1969. This lease agreement appears at pp. E104-E109. That portion of the lease agreement which Cities invokes as the legally sufficient predicate for contractual indemnification against MGO provides:

> "Tenant [MGO] agrees to defend, indemnify and save harmless the Landlord [Cities] from any and all claims, demands, suits, actions, judgments and recoveries for or on account of damage or injury (including death) to property or person of himself, his family, servants, agents or any other person, firm or corporation, caused by or due to the condition or use of said premises or the streets or roads on which they abut" (E105).

Judge Owen dismissed Cities' contractual indemnification cause of action against MGO (1106-09). The contractual indemnification cause of action was the sole cause of action asserted in Cities' third-party complaint. This entire litigation, including the trial, proceeded upon the assumption that Cities was alleging against MGO only a cause of action for contractual indemnification. During the colloquy which preceded the dismissal of the third-party complaint by Judge Owen, counsel for Cities urged that the motion to dismiss Cities' third-party complaint should be denied because Cities had a viable cause of action not only in contractual indemnification but in common-law indemnification (1087). As correctly pointed out by counsel for MGO, Cities had never alleged any cause of action in common-law indemnification in its third-party complaint (1096). At that point, counsel for Cities made a belated

motion "to amend our pleading to allege the common-law claim in addition to the contractual indemnification claim" (109 ,. Judge Owen granted Cities' motion to amend (1096). Judge Owen dismissed the third-party complaint insofar as it was based upon contractual indemnification (1106-07). Judge Owen stated that as regards Cities' newly alleged cause of action for common-law indemnification based upon *Dole* v. *Dow Chemical Co.,* 30 NY2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288, such cause of action (which as Judge Owen unequivocally stated "was not pleaded here") could be pursued in the future if Cities be so advised (1107).

Putting aside for the moment any consideration of Cities' purported cause of action in contractual indemnification and focusing solely on its purported right to seek indemnification and/or contribution under *Dole,* it is stated in Cities' brief:

> "In this regard, it should be noted that the instant complaint, answer and third-party complaint and third-party answer were filed prior to the *Dole* decision in 1972" (brief, p. 40, fn.).

Thus, Cities attempts to give this Court the impression that the pleadings herein were served and the issues framed prior to the landmark decision of the New York State Court of Appeals in *Dole.*

Cities' claim is totally incorrect and deliberately misleads this Court. *Dole* was decided by the New York State Court of Appeals on March 22, 1972. As seen from the docket entries, the summons and complaint herein were served and filed on February 28, 1973 (2). The main complaint of plaintiff was verified on February 28, 1973 (13). The third-party summons is dated May 18, 1973 (18). Cities' third-party complaint was verified by Cities'

counsel on May 18, 1973 (26). Therefore, Cities' present representation to this Court that the pleadings herein antedated *Dole* is simply factually baseless. The irrefutable fact is that *Dole* (possibly the most widely analyzed case in New York State tort history) was decided over a year prior to the commencement of the third-party action, and Cities intentionally refrained from reliance upon it, and sought refuge solely in its alleged contractual indemnification clause. In this regard, Cities' brief ironically is permeated with the complaint that Judge Owen erroneously permitted plaintiff to amend its complaint so as to allege a breach of the stipulation of settlement agreement (Cities' brief, pp. 15-16, 23, 60-61).

With respect to the *Dole* claim interjected by Cities for the first time after it had rested its own case, it is our contention that the amendment should not have been permitted (even allowing for the fact that Judge Owen granted Cities the right to a future prosecution of its *Dole* claim). But, in any event, we respectfully submit that, based upon the same grounds advanced in the instant brief addressed to the alleged contractual indemnification cause of action, Cities does not possess a viable *Dole* cause of action against MGO.

The stipulation of settlement entered into by Cities on the record in open court in New York State Supreme Court, Sullivan County, on April 25, 1972, three years after execution of the lease agreement.

The lease between Cities and MGO (containing the alleged contractual indemnification clause) was executed in March 1969 (E104). In 1967 or 1968, plaintiff had commenced an action in the Supreme Court of the State of New York, Sullivan County, against both Cities and MGO

(643). Plaintiff's action in Supreme Court was an equity action for money damages for alleged nuisance and negligence (E82). Plaintiff's action came on for trial in April 1972 before Judge Pitt (643-44, E82-E84). At that time, the three parties to the action (plaintiff, Cities and MGO) entered into a stipulation of settlement in open court (E82-E84).

The stipulation of settlement entered into on April 25, 1972 in New York State Supreme Court, Sullivan County, before Judge Pitt is set forth at pp. E82-E84. The stipulation was entered into before Judge Pitt in open court. It was agreed to by plaintiff, by Cities, and by MGO. The stipulation of settlement provided that the action which had been commenced by plaintiff against Cities and MGO in Supreme Court, Sullivan County, seeking money damages for alleged nuisance and negligence was settled and discontinued upon its merits upon payment by defendants to plaintiff of the total sum of $12,500 (E82). Of this total sum of $12,500, the sum of $7,000 was to be paid by Cities and the sum of $5,500 was to be paid by MGO (E83).

The stipulation of settlement provided that plaintiff waived any claims against Cities and MGO by reason of the:

> "operation of their said premises as a bulk oil distribution plant and gas distribution depot on and all facilities now used in relation thereto for a period of six months commencing on the date hereof, April 25, 1972, and terminating on the 24th day of October, 1972, provided that defendants comply with the terms of this stipulation hereinafter set forth regarding a correction of their premises, pursuant to a plan to be submitted to the Court for approval" (E82).

The body of the stipulation further provided:

> "It is further stipulated and agreed by and between the attorneys for the respective parties that within 60 days from the date hereof, the defendants shall submit to the Court plans and specifications for the installation of a system which will be designed to eliminate the discharge or run-off of any petroleum products from the defendants' premises onto the lands or lakes of the plaintiff, a copy of said plans and specifications to be supplied to the attorneys for the plaintiff at the same time.
>
> "It is further stipulated and agreed that upon submission of such plans and specifications to the Court, the Court shall have the opportunity to approve or disapprove of the same as it sees fit and upon the Court's approval of the same, and within 60 days thereafter, the defendants undertake and agree to commence work to institute the improvements called for by such plans and specifications, which work shall be carried out in an expeditious fashion in accordance therewith.
>
> "It is further stipulated and agreed between the parties hereto that the foregoing obligations to prepare and submit plans and construct the same shall be voided in the event that the defendants herein abandon the use of the premises for the purposes of distribution of bulk fuel oil products" (E82-E83).

Plaintiff's theory of liability against Cities as embodied in Judge Owen's charge to the jury.

Judge Owen's charge to the jury proves irrefutably that liability has been imposed upon Cities for its own intentional, deliberate, illegal and malicious acts. Judge Owen's charge referred to the stipulation of settlement in the New York State Supreme Court, Sullivan County, on April 25, 1972 (1263-65).

Judge Owen then summarized for the jury the four different theories of liability which plaintiff alleged against Cities. Judge Owen painstakingly explained for the jury the test which plaintiff was required to meet in order to recover under each theory (1265-77).

a. Plaintiff's theory that Cities breached the stipulation of settlement.

Plaintiff's first theory was that Cities breached the agreement entered into in Supreme Court, Sullivan County, between plaintiff and Cities in April 1972 (1265-66).

Regarding the alleged breach of the stipulation of settlement in Supreme Court, Sullivan County, Judge Owen charged the jury:

> "Plaintiff contends that from the evidence you may find that Cities Service in the April, 1972 agreement undertook to correct the complained-of condition and avoid further injury to plaintiff's property, and urges upon you such language as: The defendants shall submit to the Court plans and specifications for the installation of a system which will be designed as to eliminate the discharge or runoff of

any petroleum product from the defendants' premises on the land or lakes of the plaintiff.

"Defendant denies this is the import of this agreement, that it undertook any such promise.

"If you find that Cities Service undertook to correct the oil spillage in this agreement, then its failure to correct conditions on the premises, if you find that the conditions remained uncorrected, would be conduct chargeable to Cities Service even if you find that Monticello Gas & Oil's conduct was also responsible.

"Note also that if you find that Cities Service had undertaken in the April, 1972 agreement to correct the complained of conditions, and further that it failed to prevent further oil spillage and this spillage injured plaintiff, you have then found that defendant has breached this agreement and your verdict must be for the plaintiff on that cause of action. If, however, you find the agreement did not require Cities Service to prevent further oil spillage, or that no further spillage took place, then your verdict must be for defendant on this cause of action for breach of the agreement" (1267-68).

b. Plaintiff's theory of private nuisance.

Judge Owen charged that plaintiff's second theory was that of private nuisance (1269-73). Judge Owen emphasized to the jury that a *sine qua non* of plaintiff's recovery against Cities was, *inter alia*, that Cities' conduct be "intentional" (1270-71).

That "intentional" conduct was an essential element of plaintiff's cause of action in private nuisance is seen from Judge Owen's charge:

"If you find that the defendant acted knowing that such interference was substantially certain to result from its conduct or became aware that its conduct was causing such interference and nevertheless contained it—and as to this knowledge plaintiff urges upon you the April, 1972 settlement agreement—your finding will be that defendant's conduct was 'intentional.' If you find that defendant's conduct was not intentional, your verdict will be for defendant. If you find that defendant's conduct was intentional, as I defined it, you will next consider whether defendant's conduct was, under all of the circumstances, unreasonable" (1271).

c. Plaintiff's theory of trespass.

The jury was charged regarding plaintiff's third theory against Cities, the theory of trespass (1273-75). Again, the jury was charged that Cities could not be held liable upon such theory unless its conduct was "intentional" (1274-75). Judge Owen charged the jury:

"If in considering that testimony and proof your finding is that the defendant's acts, or failure to act, did cause oil to enter plaintiff's land and water, you will consider whether defendant's acts were 'intentional,' as I have earlier defined it.

"The next question, then, is to determine the matter of the defendant's intent. Intent involves the state of mind with which an act is done. It generally denotes the desire to effect a result. Obviously, if one performs a voluntary act with a desire to effect a result, he is said in law to intend that result. Furthermore, even though the defendant may have

had no desire to effect the result—that is to contaminate and pollute the plaintiff's lands and waters —if the defendant acts under circumstances known to it which make it substantially certain that the result will follow, the law charges the defendant with intent to accomplish that result.

"Therefore, if you find that the defendant did not act with intent, as I have defined it, to cause the oil to pollute and contaminate plaintiff's lands and waters, and you further find either that the defendant did not know that oil which plaintiff claims was spilled would necessarily pollute and contaminate plaintiff's land and waters, or that even though the defendant might have known, it was not substantially certain that spilled oil would pollute plaintiff's lands and waters, then your verdict with respect to the cause of action for trespass will be for the defendant.

"If, on the other hand, you find that the defendant's acts were 'intentional,' as I have defined them, that is, that the defendant did actually know when it suffered oil to be spilled, that it would be substantially certain that the oil would contaminate and pollute plaintiff's lands and waters, then your verdict will be for the plaintiff on its cause of action for trespass" (1274-75) (emphasis added).

d. Plaintiff's theory of negligence.

The jury was also charged as to Cities' negligence, and the charge incorporated the standard charge on negligence (1275-77).

e. The charge on punitive damages.

The charge of damages (1279-82) extended to a charge on punitive damages (1282-87).

Regarding punitive damages, Judge Owen charged:

> "Punitive damages may be awarded if you find that the acts of the defendant in causing or permitting the damage to plaintiff's property was wanton and reckless. Punitive damages are allowed to punish the defendant for its wanton and reckless acts and thus to deter others from the commission of like offenses. In other words, punitive damages may be awarded to deter this defendant from a repetition of the wrongful act should you so find" (1283).

The provisions of the New York State Environmental Conservation Act, which set forth a specific and comprehensive proscription against all forms of water pollution, were additionally charged (1283-85).

The Verdict of the Jury

The jury found for plaintiff upon the breach of the stipulation of settlement entered into in Supreme Court, Sullivan County, on the cause of action for private nuisance; on the cause of action for trespass; and on the cause of action for negligence (1304-05). The jury awarded plaintiff compensatory damages in the sum of $60,000 (1305). The jury also determined that plaintiff was entitled to punitive damages (1305). After being recharged on the measure of punitive damages to be granted (1319-20), the jury rendered a verdict in the sum of $200,000 (1321).

POINT I

The stipulation of settlement executed by plaintiff, Cities and MGO in open court in April 1972 in Supreme Court, Sullivan County, constituted, as between Cities and MGO, a new, independent and superseding agreement. The prior contractual provisions entered into by Cities and MGO, to the extent such provisions related to the subject matter of the Supreme Court stipulation of settlement, were merged into the stipulation of settlement. The alleged contractual indemnification agreement contained in the lease between Cities and MGO in March 1969 was consequently superseded by and extinguished by the stipulation of settlement insofar as the contractual indemnification agreement related to the subject matter of the Supreme Court action.

The terms and provisions of the stipulation of settlement which Cities expressly agreed to on the record in open court in Supreme Court, Sullivan County, are set forth, *supra*, at pages 6-8. It is incontrovertible that the stipulation of settlement superseded any and all rights and obligations of Cities and MGO *inter se* contained in the lease agreement insofar as said rights and obligations related, directly or indirectly, to the subject matter of the stipulation of settlement, namely the alleged oil pollution of plaintiff's property. The sole basis of plaintiff's action against Cities is the acts of Cities subsequent to the stipulation of settlement.

a) Cities' explicit representation contained in the stipulation of settlement and its power to fully carry out the terms and provisions of the stipulation of settlement.

Cities' brief (see *e.g.*, pp. 6, 16, 23, 29-30, 60-61) continually claims that Cities fully complied with all the terms of the stipulation in the Supreme Court action. For exam-

ple, on p. 16 of its brief, Cities argues that "the undisputed proof showed that there was no breach of that agreement." This contention, though, goes solely to whether plaintiff proved a *prima facie* case against Cities. The jury, however, found that Cities had breached the stipulation of settlement (1304).

Cities' brief (pp. 28-31, 60-61; see also pp. 15-16, 19-22) repeatedly asserts that it lacked the power to effectuate the terms of the settlement agreement in Supreme Court, Sullivan County. Cities' argument is legally insufficient and factually untenable. The execution of the stipulation of settlement constituted Cities' warranty and representation that it possessed the right and power to completely carry out the terms of the stipulation. Cities, having agreed to the terms of the settlement, cannot now be heard to argue that implementation of the stipulation was beyond its power.

Thus, as Judge Owen stated in the absence of the jury:

> "Let me give consideration to that. I am puzzled by the position Cities Service takes here because in reading the stipulation of settlement in April of 1972, regardless of ownership or absence of ownership or control, Cities Service makes a commitment here in writing to act as if it were an owner. It seems to me, therefore, the niceties of ownership are almost irrelevant. By the commitment of a stipulation of settlement of April of '72 defendants are to pay the plaintiff certain monies. The defendants agree and undertake to commence work to institute the improvements called for.
>
> "What difference does it make after April of 1972 what the ownership position is here, given the fact that Cities Service has committed itself to do all of

> these things? If there is a breach of that commitment, isn't it the same as if they were there every day helping to pump the trucks" (328-29).

The stipulation of settlement, as Judge Owen stressed, was a "contractual obligation" (343). Judge Owen also correctly stated that "the agreement between the parties is notice to the defendant of what the obligation is and the risks of non-performance, and defines the extent of willfulness" (1180).

As noted, permeating Cities' brief (28-31, 60-61; see also pp. 15-16, 19-22) is the argument that it had no "control" and no "power" to comply with the terms of the stipulation of settlement. However, in addition to having executed the stipulation, Cities under the provisions of the lease as well as under New York case law had the power to carry out the stipulation. Paragraph 6 of the lease granted to Cities "at all times . . . the right to enter the demised premises for the purposes of inspection, alteration or repair, provided however, that this provision shall not be deemed to impose upon the Landlord any obligation to effect repairs" (E105).

Cities' brief, in support of its lack-of-control argument, cites *Dick* v. *Sunbright Steam Laundry*, 307 N.Y. 422, 121 N.E.2d 399, (Cities' brief, pp. 21, 28). Cities fails to expressly cite *Cullings* v. *Goetz*, 256 N.Y. 287, 176 N.E. 397. The decision in *Dick* was based upon the authority of *Cullings* v. *Goetz*. Cities also fails to inform this Court that *Cullings* v. *Goetz* (and, hence, *Dick*) was overruled last year by the New York State Court of Appeals in *Putnam* v. *Stout*, 38 NY2d 607, 381 N.Y.S.2d 848, 345 N.E. 2d 319. In *Putnam*, the Court of Appeals held:

> "The modern trend of decision is toward holding the lessor liable to his tenants or those upon the land

with the tenant's permission where the landlord has breached his covenant to repair (see Ann., 78 ALR 2d 1238, 1252, *supra*). Recognizing that this rule is an exception to the general rule that a landlord is not liable for conditions upon the land after the transfer of possession (see *Campbell* v. *Elsie S. Holding Co.*, 251 NY 446; Restatement, Torts 2d, §§ 355, 356), the Restatement (Second) of Torts has formulated the following rule:

"'A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if

"(a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and

"(b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and

"(c) the lessor fails to exercise reasonable care to perform his contract.' (Restatement, Torts 2d, § 357.)

"We overrule *Cullings* v. *Goetz* (*supra*) and adopt the Restatement formulation as the law rule to be applied."

Judge Owen did, in substance, charge the rule laid down in *Putnam* v. *Stout* (1268-69), and the jury by its verdict determined that Cities did have control.

We respectfully submit that Cities' failure to cite *Putnam* v. *Stout* is no oversight since Cities' trial counsel was fully aware of it at the trial (857).

The amount of control vested in Cities (see paragraph 6 of the lease) and its common-law obligation (see *Putnam* v. *Stout, supra,* 38 NY2d 607, 381 N.Y.S.2d 848, 345 N.E. 2d 319) prove conclusively that by voluntarily entering into the stipulation of settlement, Cities undertook a totally new and different obligation (discrete from any provision in the lease), which obligation superseded the lease agreement and which obligation Cities had the complete legal right and full factual opportunity to meet.

In view of the lease provision and the decision in *Putnam* v. *Stout,* the statement of Cities' counsel at trial as to the duty of the owner of property in New York (342-43) simply does not reflect prevailing law.

However, beyond Cities' express representation contained in the stipulation of settlement it made and placed on the record in open court in the Supreme Court action, and in addition to its legal right, the proof adduced at trial shows indisputably that Cities at all times possessed full power to fulfill the obligations incorporated into the stipulation of settlement.

The premises were owned by Cities from 1969 until 1973 when the plant closed (423-24). All the oil tanks on the premises were owned by Cities (424). The pumps were owned by Cities (424). Greene, of MGO, testified that regarding maintenance, MGO, prior to performing any work, needed Cities' permission because it was Cities which would pay for it (443-44). It was Cities which replaced the roof and painted the tanks (444). Cities paid for the culvert (444). Cities paid for the pans which MGO placed under its loading racks to contain any of the drippings of oil (444). Greene testified, and his testimony was uncontradicted, that in order to have any construction performed at the plant, MGO needed Cities' approval; otherwise MGO would not receive payment for it (444).

All major repairs were performed by and paid for by Cities (444-45).

Langbein, Cities' own construction supervisor (447), conceded that it was Cities which owned the oil tanks on the premises (480). Langbein admitted that when the tanks were removed from the premises in 1973, it was Cities which removed them (480). Langbein further admitted:

> "Q. Wasn't it also true that Monticello Gas & Oil Company could not have removed those tanks owned by Cities Service? They were part of the structural part of the premises, right? A. That's true.
>
> Q. As a matter of fact, before anything could be done to the structural part of the premises, they would have to get your permission? A. Cities Service permission, yes" (480).*

It was admitted by Langbein that only Cities could make structural repairs (481). Admittedly, prior to the major structural repairs which were made, Cities' representatives would inspect the premises to ascertain whether such repairs were needed (481). Only after Cities was convinced that such repairs were needed were the repairs made (482). It was Cities which had installed a catch ditch (486).

Langbein admitted that Cities was empowered to enter the premises, and to inspect and determine whether any repair or maintenance was required on the premises (486-87).**

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* Langbein's testimony is in accord with paragraph 6 of the lease (E105).

** As noted *supra*, at pp. 16-17, this right which was vested in Cities is a legally sufficient predicate of liability under *Putnam* v. *Stout*, *supra*, 38 NY2d 607, 381 N.Y.S.2d 848, 345 N.E.2d 319.

Most importantly, Langbein testified:

> "The Court: That is not the question. The question is whether Cities Service owning a tank plant like that would have the right to go in and inspect it to make sure that the premises was kept up in good order.
>
> A. *They had the right* but I didn't exercise it too often.
>
> The Court: We have an answer.
>
> Q. How often did you exercise it? A. Never" (487) (emphasis added).

b) Under a long line of cases, the stipulation of settlement constituted a new, independent and superseding agreement. Therefore, the alleged contractual indemnification agreement contained in the lease between Cities and MGO was superseded by and extinguished by the stipulation of settlement to the extent that the contractual indemnification agreement pertained to alleged oil pollution of plaintiff's property (the subject matter of the stipulation of settlement in the Supreme Court action).

The alleged indemnification clause in the March 1969 lease between Cities and MGO (even assuming *arguendo* it has validity for any purpose) was, with respect to any and all indemnification for oil pollution (the subject of plaintiff's instant federal court action against Cities), totally superseded by the specific and substituted stipulation of settlement in the Sullivan County action. The stipulation of settlement was a new, independent and superseding agreement. The stipulation of settlement did not provide for contractual indemnification of any type.

Directly in point is *Moers* v. *Moers,* 229 NY 294, 128 N.E. 202, where the New York State Court of Appeals held:

> "The contract in the instant case is not a mere accord, or an accord executory. It is a new and superior contract superseding and extinguishing the contract or contracts upon which the original action between the parties was based, and the action itself. It relates to matters of differences and controversies other than, as well as, those involved in the original action. It concerns all the claims and grievances of the plaintiff against the defendant and of the defendant against the plaintiff. Each party enters into new agreements and assumes new obligations. Mutual releases shall be executed extinguishing all disputes and controversies between them. Those new and reciprocal convenants and obligations were considerations legally sufficient to invest the contract with completeness and binding effect. It is immaterial that certain obligations on the part of the defendant were to be performed 'upon receipt of said $12,500,' or 'contemporaneously with receipt of said sum of $12,500.' Refusal by the defendant to receive the moneys accomplished nothing. It did not extinguish her agreements or absolve her from the obligations they created. *It is enough that the agreements of the parties were new or created by the contract, were absolute and not dependent or conditional, were reciprocal and affected legal rights of either or both parties—a case of mutual promises, one of which is the consideration for the other.*" (299 N.Y. at 300-01) (emphasis added).

Of the greatest significance to the instant case is the fact that the stipulation of settlement occurred in open court and when all parties were represented by counsel.

It was stated in *Goldbard* v. *Empire State Ins. Co.*, 5 AD 2d 230, 171 N.Y.S.2d 194 (1st Dept.):

> "The complex of facts—conversations, circumstances and documents, if there be any—presents the basis for making inferences. Both experience and logic suggest that some recurring factors are more indicative of intention than others. These have given rise to what have been earlier described as presumptions. So it is that the courts hasten to find an intention to have a substituted or superseding agreement discharging the old where the settlement has resulted in formalized papers with unequivocal language (as in *Blair & Co.* v. *Otto V., supra*), *or in formalized or deliberate proceedings in court during the pendency of an action* (see *Langlois* v. *Langlois, supra*, and the cases cited therein)." (5 AD2d at 234) (emphasis added).

In *Langlois* v. *Langlois*, 5 AD2d 75, 169 N.Y.S.2d 170 (3rd Dept.), the court held:

> "Notwithstanding these strong reasons for construing all settlements of tort claims, in the absence of an expression of a contrary intention, as superseding agreements, there is a strong line of authority in this State to the effect that an agreement settling a tort claim made prior to suit or made out of court during the pendency of the action is presumed to be a mere executory accord. (*Atterbury* v. *Walsh Paper Corp.*, 261 App. Div. 529 affd. 286 N.Y. 578; *Canfield* v. *Pulsifer*, 226 App. Div. 445; *Kargman* v. *Brooklyn and Queens Tr. Corp.*, 263 App. Div. 720; *Rubin* v. *Siegel*, 181 App. Div. 181; but see *Ostrander* v. *Ostrander*, 199 App. Div. 437.) However, when the case is actually reached in court and a settle-

> ment is agreed upon in open court and is spread upon the minutes of the court as a disposition of the case, it is invariably construed as a superseding agreement (see e.g., *Matter of Shaver,* 282 App. Div. 816). 'The old causes of action were terminated. A new liability was substituted therefor * * * Enough to say that it superseded the old.' (*Yonkers Fur Dressing Co.* v. *Royal Ins. Co.,* 247 N.Y. 435, 446.)" (5 AD2d at 78).

In *Hansen* v. *Storm,* 7 AD2d 989, 183 N.Y.S.2d 967 (1st Dept.), order resettled 8 AD2d 711, the court held:

> "The stipulation entered into among the parties in open court purported to 'settle and discontinue' certain claims as well as the consolidated action based upon said claims, by the interchange of cash and securities in 'full satisfaction' of such claims. The payment and deliveries as contemplated by the stipulation were actually made. Claims which have thus been settled and discontinued should no longer be the subject of further litigation unless the stipulation be rescinded for proper grounds. Such a settlement is an effective disposition on the merits."

The general rule is also set forth in 15A Am. Jur. 2d, *Compromise and Settlement,* Section 24:

> "A valid compromise and settlement operates as a merger of, and bars all right to recover on, the antecedent claim or right of action included therein. *The compromise agreement is substituted for the antecedent claim or right, and the rights and liabilities of the parties are measured and limited by the terms of the agreement* The antecedent claim is extinguished, and subsequent litigation based

upon it is barred by the compromise and settlement." (emphasis added).

See also *Blair & Co.* v. *Otto*, 5 AD2d 276, 171 N.Y.S.2d 203, (1st Dept); *Putnam* v. *Otsego Mut. Ins.*, 45 AD2d 556, 360 N.Y.S.2d 331 (3rd Dept); and *Ressler* v. *Druck*, 40 Misc 2d 654, 243 N.Y.S.2d 552 (Sup. Ct., N.Y. County).

POINT II

Furthermore, Cities has been held liable herein for the repudiation, breach and violation of its own contractual obligations which were contained in the stipulation of settlement agreed to by Cities in open court in Supreme Court, Sullivan County. Since there is absolutely nothing in the lease agreement between Cities and MGO whereby MGO agrees to indemnify Cities for any repudiation, breach or violation of Cities' own contractual obligations, Cities' cause of action for contractual indemnification is also legally insufficient upon this ground.

Judge Owen charged the jury that Cities could be held liable to plaintiff based upon Cities' breach of the stipulation of settlement (1267-68). The jury found, *inter alia*, that Cities had breached the stipulation of settlement entered into in Supreme Court, Sullivan County (1304). In addition to all other grounds, Cities herein is precluded from recovery against MGO based upon the alleged contractual indemnification clause in the lease because nothing in the contractual indemnification clause (or in any other portion of the lease agreement) imposed upon MGO the duty of indemnifying Cities for the repudiation, breach, and violation of Cities' own contractual obligation entered into three years after the execution of the lease agreement.

The lease called for MGO to indemnify Cities only for any damage "caused by or due to the condition or use of said premises or the streets on which they abut" (E105).

In addition to the fact that the stipulation of settlement constituted a new, independent and superseding agreement between Cities and MGO (see Point I, *supra*), there is nothing contained in the provisions of the contractual indemnification paragraph (E105) which would in any manner place upon MGO the obligation of indemnifying Cities by virtue of a contractual obligation entered into by Cities. Even if the stipulation of settlement had occurred prior to the contractual indemnification provision (which is admittedly not the situation), nothing in paragraph 8 of the lease agreement (E105) requires MGO, as a fair reading of paragraph 8 will demonstrate conclusively, to indemnify Cities for Cities' breach of its own contractual obligations. In the instant case, Cities, having voluntarily assumed the burden of certain specified contractual obligations in the stipulation of settlement, cannot, if Cities is concluded to have breached such contractual obligations, attempt to stretch the language of the contractual indemnification provision so as to encompass within its ambit an obligation upon MGO's part to indemnify Cities for the breach of Cities' own contractual duty.

POINT III

The alleged indemnification agreement on its face provides for indemnification only if damage is "caused by or due to the condition or use of said premises." Liability has been fastened upon Cities in the instant action solely for its own intentional acts. Therefore, Cities, under the facts of the instant case, may not recover against MGO upon the alleged indemnification agreement since the agreement does not afford indemnification for intentional acts.

Cities has been held liable in the present case not for any damage "caused by or due to the condition or use of said premises or the streets on which they abut" which is the only situation in which MGO, under the lease agreement (E105) is required to indemnify Cities. *Cities is being held liable for its own affirmative and intentional acts and for nothing else.*

Cities, if found liable to plaintiff, would be held liable only for its own intentional actions. Cities' acts were not merely negligent. Cities' conduct consisted of intentional activity for which no indemnification was given to Cities by MGO under the lease agreement. Since the alleged indemnification agreement did not include indemnification for Cities own intentional conduct, no contractual indemnification flows from MGO to Cities upon the facts of the instant case.

Cities' own counsel repeatedly recognized that the conduct charged against Cities was "intentional." Thus, prior to the charge, Cities' counsel stated:

> "Is your Honor going to charge on both trespass and nuisance that it is necessary to show intentional acts on the part of the defendant in order to find a

liability of either nature, that these are intentional torts?" (1157).

Cities' counsel stated to Judge Owen that for Cities to be held liable on the nuisance cause of action, "it would have to be a finding of conduct on the part of Cities Service, intentional affirmative conduct" (1158).

Indeed, Cities' own brief (p. 22) urges dismissal of plaintiff's cause of action in trespass upon the ground that plaintiff failed to prove that Cities' acts were intentional. Cities' brief (p. 49) urges that punitive damages were unwarranted because "no malicious act or conduct was proved against Cities Service" and that "a plaintiff seeking punitive damages must establish that the defendant's acts were '. . . morally culpable . . . or . . . activated by evil and reprehensible motives' ", citing *Walker* v. *Sheldon,* 10 N.Y. 2d 401, 404. Similarly, it is stated in Cities' brief (p. 67) that the verbatim quotation of the New York State Environmental Conservation Act in Judge Owen's charge to the jury (1283-85) spelled out a "criminal act." Cities' case against plaintiff pivots upon the validity of these contentions. But if plaintiff's judgment against Cities be sustained, the nature of Cities' acts inherent in its liability to plaintiff precludes Cities from reliance upon the alleged indemnification agreement.

As already shown, Judge Owen's charge to the jury made the issue of Cities' liability to plaintiff dependent upon whether the jury determined that Cities' acts were intentional (see pp. 8-13, *supra*). The lease is clear. Indemnification is not provided for any intentional acts committed by Cities. Even if Cities were to argue, however, that the agreement was ambiguous on this issue (which it is not), any ambiguity inherent in the lease must be construed and resolved against Cities since the lease agree-

ment was on Cities' own printed form (E104-09). Directly in point is *Humphries* v. *Consolidated Edison,* 314 F. Supp. 1052 (S.D. N.Y. 1969), affd. 429 F. 2d 422 (2d Cir., 1970), where Judge Bonsal, in dismissing the third-party complaint of third-party plaintiff Consolidated Edison based upon an alleged contractual indemnification agreement, held:

> "If there is any ambiguity in paragraph 4, as to whether it applies only to the Contractor's equipment, or was intended to include Con Ed's as well, and as to whether the fluorescent light fixture was the type of equipment intended, ' "any fair doubt as to the meaning of its own words should be resolved against" ' Con Ed since the contract was written on Con Ed's form. Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 348, 126 N.E.2d 271, 273 (1955)." (314 F. Supp. at 1057)

In the case at bar, liability has not been imposed upon Cities because of MGO's use of the premise. Cities' liability stems solely from its own intentional acts and omissions. The consequences of Cities' own intentional conduct may not be passed on to MGO via the alleged indemnification agreement which does not provide for indemnification for Cities' intentional acts.

POINT IV

Even assuming *arguendo* that the alleged contractual indemnification agreement could be construed to cover intentional acts, Cities, as a matter of law, may not invoke the agreement against MGO because if Cities is held liable to plaintiff, such liability will be based solely upon Cities' own intentional, deliberate, malicious and illegal acts, and any indemnification under such circumstances would manifestly be violative of public policy.

Solely in the alternative, we respectfully contend that assuming *arguendo* the alleged contractual indemnification agreement could be stretched so as to provide for indemnification against Cities' own intentional acts, the agreement should not be enforced upon grounds of public policy. If the judgment herein in favor of plaintiff against Cities be affirmed, such affirmance will constitute a finding that Cities has been guilty of the commission of intentional, deliberate, malicious and illegal acts. Under both well-settled case law as well as basic considerations of public policy, Cities is not entitled to enforce the alleged contractual indemnification agreement.

The general rule is set forth in 28 N.Y. Jur., Indemnity, §5:

> "One may not indemnify another against the consequences of his illegal acts, nor may one obtain indemnification of his own intentional and criminal conduct."

It is basic that "one may not indemnify another against the consequences of his illegal acts" (*Municipal Metallic Bed Mfg. Corp.* v. *Dobbs*, 253 N.Y. 313, 316, 171 N.E. 75).

To the same effect is *Hart* v. *City Theaters Co.*, 215 N.Y. 322, 330, 109 N.E. 497, where the New York State Court of Appeals held:

> "Courts will not be astute to sustain contracts when the effect will be to weaken the efficacy of laws and regulations designed for the protection of human life. Where a contract on its face, whether so intended by the parties or not, offends against statutes intended to promote public safety, the courts will not enforce it."

See also *Feuer* v. *Menkes Feuer, Inc.*, 8 AD2d 294, 298, 187 N.Y.S.2d 116 (1st Dept.).

In this Court's decision in *Warren* v. *Hudson Pulp & Paper Corp.*, 477 F.2d 229 (1973), a diversity action which applied New York law, plaintiff, a boilerroom foreman, was an employee of third-party defendant Treadwell Corp. Plaintiff was supervising the construction of two boilers undertaken by Treadwell in the performance of a construction contract Treadwell had with defendant and third-party plaintiff Hudson Pulp & Paper Corp. Plaintiff claimed that he sustained permanent damage to his respiratory system caused by the inhalation of noxious and toxic fumes produced in Hudson's industrial operation adjacent to the construction site. The fumes had persisted for over a period of three months. *In Warren, plaintiff commenced solely a negligence action against defendant.*

This Court in *Warren*, in an opinion by Judge Holden, affirmed plaintiff's judgment against defendant Hudson. Defendant and third-party plaintiff Hudson had an all-encompassing indemnification agreement with Treadwell (see 447 F.2d at 234-35, fn.). One of Treadwell's arguments in this Court was that the indemnification contract should not be enforced because plaintiff's injury was

caused by Hudson's intentional wrongdoing and not by its negligence. This Court rejected Treadwell's argument, holding:

> "Treadwell's contention that Hudson was an intentional wrongdoer and thus is beyond protection of the indemnity agreement is similarly without merit. Tolerance of a known dangerous condition which eventually causes injury is negligent where the party permitting the danger to continue violates a duty owed to the plaintiff. *But its neglect is no more than negligence; it is not an intentional wrong.* See e.g., *Levine* v. *Shell Oil Co., supra*" (447 F.2d at 235) (emphasis added).

In the present case, there is absolutely no question that if the issue of the third-party action be reached, Cities' conduct constituted intentional wrongdoing. This inescapable conclusion is seen from the charge and the verdict adverse to Cities on the questions of nuisance, trespass and punitive damages, each of which demanded a jury finding, at the minimum, of intentional wrongdoing (1269-75, 1282-87). The finding of punitive damages, in fact, went far beyond intentional wrongdoing. The charge on punitive damages necessitated a jury finding that Cities' conduct was "wanton and reckless" (1283).* Furthermore, Cities' breach of the stipulation of settlement which was also the finding of the jury (1304) was no mere act of negligence, but a deliberate breach of its contractual obligation entered into in open court in Supreme Court, Sullivan County.

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* Judge Owen stated to counsel in the jury's absence that he had charged the standard of recklessness as contained in the New York State Penal Law (1295). Cities' brief (p. 67) admits that a violation of the New York State Environmental Conservation Act, which was given to the jury, constitutes the commission of a criminal act.

It is self-evident that if a party be allowed to protect itself against its own intentional wrongdoing by the shield of an indemnification agreement, there exists no incentive to terminate or diminish its wrongdoing. Armed with the indemnification agreement, the wrongdoer can simply engage in any type of conduct, secure in the knowledge that any liability imposed upon it can, in effect, be averted by having it passed along through the indemnification agreement. The dictates of public policy mandate prevention of such a result.

POINT V

In any event, the facts herein demonstrate incontrovertibly that the lease agreement constituted a contract of adhesion and was unconscionable in all respects. As a matter of law, the lease agreement printed on Cities' own form was not "an arm's length transaction" between Cities (possessing a net worth of over $1,300,000,000.00) and MGO.

Aside from any other consideration, the evidence proves, as a matter of law, that the alleged contractual indemnification agreement was not a contract arrived at in "an arm's length transaction." It was unconscionable in its entirety. In *Levine* v. *Shell Oil Co.*, 28 NY2d 205, 213, 321 N.Y.S.2d 81, 269 N.E.2d 799, the New York State Court of Appeals held:

> "Lastly, there has been no showing that the agreement involved herein is either a contract of adhesion or an unconscionable agreement and we need not now pass upon the question whether an indemnification clause in a contract of that nature would be void for those reasons" (28 NY2d at 213).

In *Hogeland* v. *Sibley, Lindsay & Curr Co.*, —— NY2d —— (dec. June 16, 1977), the New York State Court of Appeals not only carefully refrained from placing its imprimatur on all alleged contractual indemnification agreements, but, to the contrary, specifically emphasized that where the parties are not dealing at arm's length or where the parties do not possess "relative bargaining positions," a court will refuse to enforce such an agreement. In *Hogeland,* the New York State Court of Appeals held:

> "Significantly, it was thought noteworthy in *Levine* v. *Shell Oil Company* (*supra*, p. 213), that there was no evidence there of 'fraud or overreaching conduct', that it was an 'arm's length transaction' and that 'there has been no showing that the agreement involved . . . either a contract of adhesion or an unconscionable agreement'. This is not to say that adhesion principles may not be applicable to an agreement entered into in a commercial lease, but rather that they do not apply here where the landlord contracted for no direct exculpation from negligence towards his indemnitor, where insurance was provided as a form of continued responsibility *and where the parties were so equal in their relative bargaining positions* (see Love, Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability, 75 Wisc. L. Rev. 19, 85)" (emphasis added).

That an "arm's length transaction" and "relative bargaining positions" are a *sina qua non* to the operative effect of an alleged contractual indemnification agreement is seen from the rationale of *Hogeland* where the New York State Court of Appeals stated:

> "At the very outset, we remark on the fact that the lengthy lease before us obviously was one negoti-

> ated at arm's length between the representatives of two sophisticated business entities, one a large department store company and the other the real estate corporation which organized, owned, constructed and managed the shopping center. The tenant had tailored the construction to its special needs. And the mutual nature of the arrangements for the maintenance of appurtenances such as those involved in this very case is tell-tale evidence that the lease was not one whose making was dominated by either party."

In the case at bar, there was, as a matter of law, no "arm's length transaction"; there were no "relative bargaining positions." As a matter of law, the lease agreement was a "contract of adhesion" and an "unconscionable agreement."

It was stipulated at trial that the net worth of Cities was $1,336,035,000.00 (1308-09). See generally the balance sheet of Cities which appears on p. E103. The lease agreement itself shows incontestably that this was not a lease negotiated at arm's length. This lease was a printed form containing Cities' own name and logo. The printed provisions attest to the one-sided nature of the lease agreement (E104-09). MGO was a distributor of Cities (422-23), and such fact provides conclusive proof, if any be needed, of the unequal bargaining position of the two parties.

CONCLUSION

Judge Owen properly dismissed Cities' third-party complaint. Regardless of this Court's disposition on Cities' appeal against plaintiff, that portion of the judgment which dismissed the third-party complaint of Cities Service Oil Company against MGO Corp. and Monticello Gas & Oil Co., Inc. should be affirmed.

Dated: New York, New York
August 26, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

376—Affidavit of Service by Mail

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

DORALEE ESTATES, INC.,
Plaintiff-Appellee,

against

CITIES SERVICE OIL CO.,
Defendant & Third-Party Plaintiff-Appellant,

against

MGO CORP. & MONTICELLO GAS & OIL CO., INC.,
Third-Party Defendant-Appellees

State of New York, County of New York, ss.:

Kenneth P. Riccardi, being duly sworn deposes and says that he is the attorney agent for Grubbs, Leahy & Donovan, Esqs. Appellees herein. That he is over for the above named Brief of Third-Party Defendants- 21 years of age, is not a party to the action and resides at 2821 W 12 St. Bklyn, NY 11224

That on the 26 day of August, 1977 he served the within

BRIEF OF THIRD-PARTY DEFENDANTS-APPELLEES

upon the attorneys for the parties and at the addresses as specified below

Gerald Orseck, Esq.

Orseck Law Offices

Route 52 East

Liberty, N.Y. 12754

by depositing Two true briefs

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at

90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 26 day of August, 1977

Roland W. Johnson

Kenneth P. Riccardi

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1979

Service of ~~[illegible]~~ two R copies of

the [illegible]

hereby [illegible] day

of [illegible]

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Attorney for